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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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No.

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COASTAL PETROLEUM COMPANY, *Petitioner,*

v.

TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA, *Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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Coastal Petroleum Company, the petitioner herein, prays that a writ of certiorari issue to review whether it was proper in this case for the United States Court of Appeals for the Fifth Circuit to certify questions of fact, and not merely of Florida law, to the Supreme Court of Florida (pursuant to the Florida certification statute).

## OPINIONS BELOW

The Fifth Circuit made its original certification in this case to the Supreme Court of Florida in a decision reported at 489 F. 2d 777. It is reprinted in Appendix A hereto, p. 1a, infra. A petition for rehearing by Coastal Petroleum Company was granted in significant part, and otherwise denied, in an opinion by the Fifth Circuit reported at 491 F. 2d 973, and reprinted in Appendix B hereto, p. 18a, infra.

## JURISDICTION

The decision of the Fifth Circuit making the original certification in this case to the Supreme Court of Florida was entered on December 6, 1973. The opinion on rehearing was entered on March 29, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), which authorizes review by certiorari "before or after rendition of judgment or decree" by a court of appeals.

## QUESTIONS PRESENTED

1. Whether a federal court of appeals, acting under a state statute that permits federal appellate courts to certify "questions or propositions of the law of this state" to the highest court of the state, may certify factual questions as well. The Fifth Circuit said here (Appendix B, p. 18a):

> "Whether footage evidence was directed to compliance with the lease, the statute, or both, and whether it affords a sufficient factual basis for resolving the consequent questions of Florida law must be left in the first instance to the Florida Supreme Court."

2. Whether a federal appellate court may permit an appellant to introduce on appeal, for the first time, a new issue, when (a) that new issue cannot be determined without the underlying facts, and (b) there are no facts in the record (because the issue was never raised below) pertinent to that issue. And whether this new issue can be entertained on appeal for the first time, when the compulsory counterclaim rule would have required the opponent to counterclaim for a refund or lose the claim, and counterclaims cannot be asserted for the first time in an appellate court.

## STATUTE INVOLVED

Florida Statutes 25.031:

> "The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the law of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state laws, which certificate the supreme court of this state, by written opinion, may answer."

## STATEMENT OF THE CASE

In 1941, Coastal Petroleum Company's predecessor (Arnold Exploration, Inc.) entered into a contract with the Trustees of the Internal Improvement Trust

Fund of the State of Florida.[1] This contract, entitled "Exploration Contract for Oil, Gas and Minerals and Option to Lease," was entered into under authority granted the Trustees by Ch. 20,680, Florida Laws, 1941. Pursuant to this contract, and particularly the "Option to Lease," the Trustees and Coastal entered into three leases entitled Drilling Leases 224-A, 224-B, and 248. Each lease recites that it was entered into pursuant to the "Exploration Contract for Oil, Gas and Minerals and Option to Lease" of 1941, specifically referring to Ch. 20,680. These three leases were re-executed in 1947 to make adjustments in view of claims then being made by the United States against various water-bottom acreages claimed by certain States (including Florida), in the "Tidelands" litigation. Some of those "Tidelands" issues were settled by this Court's decision in *United States* v. *California,* 332 U.S. 19 (1947), but the issues as to Florida were not fully resolved until this Court's decision in *United States* v. *Florida,* 363 U.S. 121 (1960).

In 1945, Florida enacted a new statute (Chapter 22,824) which repealed the above-described 1941 statute and gave a different, and more limited, authority to the Trustees to issue oil and gas leases, but—among other differences from the 1941 statute—did not include authority to grant mineral leases.

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[1] The Trustees, by statute, hold the title to publicly-owned lands of the State of Florida, including bottoms of seas and fresh waters. Florida Statutes 253.01 and 253.02. The Trustees are whoever may then be the highest officers of the State—the Governor, the Secretary of State, the Attorney General, et al., acting in a corporate form for this purpose.

The 1941 statute required that each lease require the lessee to drill at least one test well on the lands leased within the first five-year period, and one additional test well in each succeeding five-year period. *The statute does not define "test well;" it does not prescribe any depth to which a test well must be drilled.* Thus no one can say what is a "test well" as specified in the statute without assistance from probative evidence, such as legislative background, custom in the trade, usage at the time, etc. There was no such evidence at the trial, nor did this issue ever arise.

The leases (which recite that they are made pursuant to the 1941 statute) do define a "test well" as being not less than 6,000 feet for oil and gas.[2] They require total footage of 60,000 feet of such wells within each five-year period, on the lands leased or on contiguous areas.

The 1945 statute required that each lease require the lessee to drill at least one test well within each two-and-one-half-year period, each such well to be drilled to a minimum depth of 6,000 feet.

The 1941 statute, the leases, and the 1945 statute each contain provisions that the leases "shall be void" if drilling obligations are not met.

Throughout four full five-year periods of each lease—that is, for over 20 years—the Trustees repeat-

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[2] For minerals, the depth is 1,000 feet. Hereinafter in this Petition, we shall use "6,000 feet" to include both the oil and gas depth and the mineral depth.

edly adopted formal resolutions stating that Coastal had satisfied all its drilling obligations, all such resolutions being based on drilling that Coastal performed with the knowledge and approval of the Trustees. Some of this drilling was performed on lands (on which the Trustees were given by Coastal an overriding royalty) not covered by Coastal's leases, and it was credited by the Trustees to Coastal's leases. Overall, Coastal has drilled more total footage than its leases require, and all that footage has been on lands on which the Trustees receive the same overriding royalty as is prescribed in Coastal's leases.

Over the years, Coastal and the Trustees were in litigation concerning these leases at least five times, and in several of those cases the court specifically recited that Coastal's leases were valid. But in 1968, when Coastal was refused a permit to produce minerals by the United States Army Corps of Engineers, at the urging of the Trustees, and Coastal sued the Engineers to obtain the permit, the Trustees (a party to the case) then raised the claim that Coastal's leases were invalid. The issue of the validity of the leases was set separately for trial, and at trial the Trustees put forth only one issue—that Coastal had not complied with the drilling requirements *of the leases.* (To repeat, those lease requirement were that Coastal must commence wells every five years, on the lands leased or on contiguous areas, and drill them *to a depth of at least 6,000 feet* for a total footage of 60,000 feet.)

No mention was ever made at the trial of the requirement of the 1941 statute that "a test well" (undefined as to depth) be drilled during five-year periods, or of the requirements of the 1945 statute that test wells be drilled every two-and-one-half years. The only issue was that of the drilling requirements *of the leases,* and

therefore the only evidence introduced by Coastal related to wells that would conform to the leases—that is, wells of 6,000 feet or more.

The United States District Judge, after a full trial, found that Coastal's leases were valid. The Trustees appealed to the Fifth Circuit and on appeal, for the first time, inserted the new claim that Coastal had not conformed to the 1941 statute—that is, that Coastal had not drilled "a test well" on the lands leased during each five-year period.

Coastal protested to the Fifth Circuit that a new and surprise issue of this sort, which would depend upon evidence not adduced at the trial or contained in the record, should not be entertained by the Court. We said that this issue in fact *could not* be decided on the present record, since all the evidence at the trial related only to 6,000-foot wells. Coastal did not, we pointed out, attempt to introduce evidence of drilling wells of less than 6,000 feet, since these would not have been relevant to the only issue raised at the trial (the lease requirements). Yet such wells of less than 6,000 feet —and Coastal drilled many—doubtless would have complied with the 1941 statute. To permit this issue to be raised on appeal for the first time, and then to find there was no evidence of drilling wells of less than 6,000 feet, places Coastal in a straitjacket with paralyzing effect.[3]

After the case was briefed and argued in the Fifth Circuit, that court issued a decision (reprinted in Appendix A, infra, pp. 1a-17a) on December 6, 1973, certifying the case over to the Supreme Court of Florida, pursuant to the Florida certification statute, Florida

[3] Coastal also protested the insertion of the 1945 statute as an issue on appeal, when it had not been raised in the District Court.

Statutes 25.031, on the ground that the case as it now stood presented only issues of Florida law which should be settled by that State's highest court. The Fifth Circuit included, among the questions to be settled, whether Coastal's rights and obligations were governed by the 1941 statute, the 1945 statute, or both statutes, and whether the leases would be void if Coastal had failed to comply with the drilling requirements *of the statutes.* The Fifth Circuit's opinion contained (see Appendix A, infra, at p. 12a) this sentence:

> "Coastal has never complied with the drilling obligations imposed by the 1941 and 1945 Statutes or by the leases themselves."

This was shocking. We had repeatedly told the Fifth Circuit, at the oral argument and during the preparation of the certification papers, that (1) the issue of drilling compliance with *statutes* was never raised in the trial court, and (2) more importantly, there was *no evidence in the record* on which this issue could be decided, since the only evidence in the case pertained to compliance with the *leases.* (Of course Coastal complied with its leases, as found by the district court.) Now here was the Fifth Circuit entertaining the issue on appeal, saying that there *was* evidence in the record on wells of less than 6,000 feet and—most incredible of all—stating that the evidence showed that Coastal had "never complied" with the statutes or leases.

Coastal timely filed a Petition for Rehearing challenging the "never complied" sentence [4] as "an error so monstrous, so serious, so important, as to virtually fore-

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[4] There were other errors in the Fifth Circuit's decision in Coastal's opinion, but we limited the Petition for Rehearing to the quoted sentence, because of its death warrant effect.

close the issue which this Court is asking the Supreme Court of Florida to decide. It is tantamount to a death warrant in the name of a certification." Coastal's Petition for Rehearing told the Fifth Circuit (once again) that the issue of compliance with statutes had never been raised below and that there was no evidence at all as to wells of less than 6,000 feet; thus the issue of compliance vel non could not be determined on the present record. And, as it had done before, Coastal told the Fifth Circuit that on these issues, certification to the Supreme Court of Florida could accomplish nothing at all, since the Florida Supreme Court could not hold hearings, hear witnesses, take evidence, and make the record necessary to the issue of compliance. There was, in short, an evidentiary gap.

Most of all, Coastal complained that the Fifth Circuit had filled the evidentiary gap by telling the Florida Court that (1) there was evidence on the issue, and (2) that evidence showed that Coastal had "never complied." Both of these propositions, Coastal told the Fifth Circuit, were absolutely untrue.

Coastal went on, in its Petition for Rehearing, to tell the Fifth Circuit the magnitude of this case (which, obviously, the Fifth Circuit had not realized). Coastal's leases, so greatly endangered by the Fifth Circuit's "never complied" statement as to make their forfeiture a probability, cover over 4,500,000 acres and are possibly the largest oil and gas leases in the United States—certainly they are by far the largest such leases in the Southern United States. Their value is potentially in the billions of dollars. Over sixteen million dollars ($16,000,000.00) has been spent thus far on these leases in exploration costs and rental fees,

without any return to Coastal (and the Trustees have not offered to return any of this money). The challenge by the Trustees to the validity of these leases was made just as Coastal was to begin commercial production of minerals. In today's "energy crisis," the Coastal leases represent a most significant asset.

The Fifth Circuit, after calling for a response from the Trustees to the Petition for Rehearing, issued a decision on rehearing on March 29, 1974 (Appendix B, infra, p. 18a). The Court withdrew and deleted its sentence that Coastal had "never complied" with the drilling obligations of the statutes or of the leases. But the Fifth Circuit said also that it believed that the issue of compliance with the 1941 statute *was* brought to the trial court's attention.[5] And the Court then said (Appendix B, infra, at p. 18a):

> "Whether footage evidence was directed to compliance with the lease, the statute, or both, and whether it affords a sufficient factual basis for resolving the consequent questions of Florida law must be left in the first instance to the Florida Supreme Court."

## REASONS FOR GRANTING THE WRIT

Certification statutes, such as the Florida statute here involved, enabling federal appellate courts to obtain directly an authoritative pronouncement of state law from the highest court of a state, are a recent and a growing development. In an *Erie Railroad* v.

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[5] The Court said (Appendix B, infra, at p. 18a): "Being leases made pursuant to the 1941 and 1945 statutes, the District Court's holding that the leases were valid necessarily contemplates validity under the underlying statute."

*Tompkins* situation, they permit a shorter and a less expensive route to state law than the federal abstention doctrine, which requires an entire new line of litigation, and this Court has referred to the Florida statute as an example of "rare foresight." *Clay* v. *Sun Insurance Office, LTD,* 363 U.S. 207, 212 (1960). Resort to such a statute "does of course in the long run save time, energy, and resources, and helps build a cooperative judicial federation." *Lehman Brothers* v. *Schein,* 416 U. S.———(April 29, 1974).

But the Florida statute, like the others, permits only certification of "questions or propositions of the laws of this state." It does not permit a federal appellate court to place upon the State Supreme Court a fact-finding responsibility. The statute cannot be used by the federal appellate court to avoid the necessity of having the factual record made in the federal trial court. The attempt here by the Fifth Circuit to shift to the Florida court the burden of filling the evidentiary gap is a misuse of the certification statute and an evasion of the duty of the federal court. In view of the growing importance of the certification statutes, which still are in their infancy, this Court should grant certiorari here to issue guidance for the future.

Another question in this case relates to the raising of new issues on appeal. Of course, a new issue may be sometimes entertained (or even raised) on appeal for the first time, where (a) the record contains evidence sufficient to decide the issue, or (b) the issue is one of pure law and requires no additional evidence. But how may the issue be entertained if it depends upon additional facts, and the record contains no such evidence? Yet that is what happened here. A

decision rendered without evidence to support it deprives a litigant of due process of law.

A second facet of the new-issue problem relates to the compulsory counterclaim rule, F. R. Civ. P. 13(a). If, as the Trustees suddenly contended in the Court of Appeals, these leases have been invalid for many years because of noncompliance with statutes, undoubtedly a refund would be due to Coastal from the Trustees for a substantial part of the rental fees they have accepted from Coastal and drilling expenditures they have encouraged Coastal to make (a total of some $16,000,000.00) over some twenty-five years. That would have been a compulsory counterclaim if the issue had been raised in the District Court, and Coastal would have had to plead it or lose it. But no counterclaim can be filed in the Court of Appeals. Will the refund claim now be barred? This is a problem arising when the Fifth Circuit entertained the new issue tendered on appeal by the Trustees, and it is a problem whenever an appellate court accepts a new issue which may trigger a compulsory counterclaim.

**1. Federal Appellate Courts Must Not Be Permitted to Use the New Certification Statutes For Fact-Finding Purposes**

Certification statutes such as Florida's are new on the American scene, but they appear to be the wave of the future. Florida's was the first, enacted originally in 1945 (Fla. Laws 1945, c. 23098, § 1) and amended in 1957 to its present form. Fla. Laws, 1957, c. 57-274, § 1. The statute lay dormant, however, for fifteen years; it was never used until this Court, in *Clay* v. *Sun Insurance Office, LTD,* 363 U.S. 207 (1960), following a suggestion in Kurland, "Toward a Cooperative Federalism," 24 F.R.D. 481, 489 (1959),

breathed life into the statute. At that time, there were no other such statutes. Four years later, a Note in 111 U. Pa. L. Rev. 344 (1963), "Inter-Jurisdictional Certification: Beyond Abstention Toward Co-operative Judicial Federalism," lauded the Florida statute (and even drafted a proposed model state certification statute), but was able to point to no other state. In 1969, however, a Note in 22 Fla. L. Rev. 21, "Florida's Inter-Jurisdictional Certification," cited four more states—Maine, Hawaii, New Hampshire, and Washington—as having adopted such statutes. And now, according to this Court's opinion in *Lehman Brothers* v. *Schein*, 416 U.S.——(April 29, 1974), there are ten such states. The American Law Institute encourages certification statutes. *Study of the Division of Jurisdiction Between State and Federal Courts* (1969), § 1371 (e) and Commentary thereon.

The pace is quickening, and if this is to be the principal manner in which state law is determined in *Erie Railroad-Tompkins* situations, effective supervision of the way in which such statutes are employed will be important in the administration of the federal judicial system. This Court's experience with the effect of state certification statutes in Courts of Appeals appears to have been limited to two cases: The *Lehman Brothers* case, supra, and *Clay* v. *Sun Insurance Office, LTD*, 363 U. S. 207 (1960).[6] In both of those cases, as it happens, the Court of Appeals did *not* employ the certification statute. In both cases, then, this Court's encouragement of resort to the procedure—in the sound discretion of the federal court,

[6] This Court has itself employed the Florida statute in two cases. *Dresner* v. *City of Tallahassee*, 375 U.S. 136 (1963); *Aldrich* v. *Aldrich*, 375 U. S. 249 (1963).

of course—was made in an abstract atmosphere. There was no actual certification before this Court.

In both those cases, as in the two cases in which this Court itself employed the statute, the issues appeared to be clearly questions of "law." That is what the statutes are all about; the Florida statute permits only certification of "questions or propositions of law." But in the case at bar, in which an actual certification can now be scrutinized by this Court, we see a perversion and a misuse of the statute. While there are, of course, questions of law involved in the certification, the federal court has also attempted to send over to the Florida court a fact-finding function as well. The Fifth Circuit, under attack from Coastal for having said that "Coastal has never complied" with statutes or leases, which implies that the record contains evidence sufficient to decide that issue, deleted that statement of purported fact and instead said (Appendix B, infra, p. 18a):

> "Whether footage evidence was directed to compliance with the lease, the statute, or both, and whether it affords a sufficient factual basis for resolving the consequent questions of Florida law must be left in the first instance to the Florida Supreme Court."

The Fifth Circuit has thus asked the Florida Supreme Court to decide: is there evidence in the record relating to compliance with statutes? If so, what is that evidence? Does it provide a sufficient basis for determining the questions of law?

Of course this is not the function of a certification statute. Such a statute assumes that the record is made and completed in the federal court system, and that the State court is being asked to answer as to

"questions or propositions of the laws." Not as to *facts*. If there is an evidentiary gap, as turned out to be the case here when the Fifth Circuit permitted new issues to be introduced on appeal, it cannot be filled by assigning the task to the State court. If the federal courts are going to divert certification statutes to factual uses, it is important that this Court step in now, early in the day, and put matters straight. There is no such thing as "State facts" under the *Erie* principle; there is only State law.

It is familiar doctrine that this Court may grant certiorari to review the manner in which the Courts of Appeal conduct judicial business. See e.g., *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247 (1953), in which the Court granted certiorari purely for the purpose of scrutinizing the exercise of en banc power by a Court of Appeals. The Court should grant certiorari here in a situation that may become increasingly important as certification statutes continue to be enacted in the States.

Scrutiny of the certification made in this case by the Fifth Circuit, the first actual certification (as we have said) to come before this Court so far as we know, reveals another startling fact stemming from the use of the certification process. Something drastic has happened to the normal relation of an appellate court to the factual findings of the trial court. Rule 52(a), F. R. Civ. P., which governs in actions tried without a jury, as in the case at bar, provides that findings of fact "shall not be set aside unless clearly erroneous." And this Court has many times taken occasion to compel Courts of Appeal to give the proper deference to the functions of trial judges. E.g., *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *United*

*States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948;) see Wright, *Federal Courts* (2d Ed., 1970) § 96.

In this case the Fifth Circuit, no doubt unwittingly, has completely evaded the relation between trial and appellate courts by the round-robin procedure involved in certification. First, the Fifth Circuit prepares "facts" in its certification opinion and sends that certificate over to the Supreme Court of Florida. That court, of course, must accept the certificate without question. Then the Supreme Court of Florida, employing the underlying "facts" stated in the certificate, answers the questions of law and sends its opinion back to the Fifth Circuit. That opinion, says the Fifth Circuit, is binding upon it; what the Florida Supreme Court says "is the law of the Medes and the Persians which binds Floridians and *Erie*-bound Federal Judges . . ." *Allen* v. *Estate of C. F. Carman,* 486 F. 2d 490, 492 (5th Cir., 1973).

But what has happened to the findings of the trial judge here? (It will be recalled that he held the leases valid.) Where did the Fifth Circuit get the "facts" set forth in the certification? A glance at the certification decision, Appendix 1a infra, reveals at pp. 5a-6a that the parties were asked to prepare the certification proper, stating the facts and the questions of law to be answered, and where the parties could not agree on the facts, they stated their "contentions". The Fifth Circuit, in every instance, *adopted the "contentions" of the Trustees.* See footnotes 2-8 to the decision. Those contentions were then set forth as facts, although many of them were never before the trial judge and may even be contrary to his findings.[7] And by the time

[7] The portion of the opinion of the trial judge (315 F. Supp. 845) dealing with the validity of the leases is printed as Appendix C herein, beginning at p. 21a.

they return to the Fifth Circuit from the Florida Supreme Court, those "facts" will be set in concrete. Yet they derive not from the trial judge, not from the record, not from any independent finding by the Fifth Circuit, but from the mere contentions of one of the parties!

Perhaps the certification procedure, when the parties are asked to prepare the certificate (and the court must choose, if there is disagreement as to what the facts are), lends itself to this unfortunate situation. If so, this new jurisprudence—certification from a federal appellate court to a state appellate court—can undermine the relations between trial and appellate courts in the federal system. This Court should review the procedure and give guidance so that the fundamental function of federal trial courts is not lost in the certification process.

**2. Federal Appellate Courts Cannot Be Permitted to Entertain New Issues on Appeal Where There is No Evidence in the Record on Which Those Issues Can Be Decided**

In our brief to the Fifth Circuit, and in oral argument, we repeatedly told that Court that it not only *should* not permit the Trustees to inject at the appeal level a new issue (whether or not Coastal had complied with statutes), but that it *could* not, because there was no evidence in the record pertaining to "test wells" of less than depths prescribed in the leases, which would have complied with the 1941 statute. We cautioned the Court then, and in our certification papers, that it would be futile to send this issue over to the Supreme Court of Florida, since that Court could not fill the evidentiary gap. But the Fifth Circuit has done so.

We are, of course, not saying that appellate courts may not entertain issues injected for the first time on

appeal. While there is a general policy against permitting a litigant to introduce, on appeal, an issue he did not place before the district court, this is not a question of power. Every appellate court, including this Court, has power to entertain new issues and to decide the case on such an issue. But, as a matter of "due process," this can be done *only if there is evidence in the record sufficient to form a basis for decision.* Thus, in *Fountain* v. *Filson,* 336 U.S. 681 (1949), this court reversed a Court of Appeals for deciding the case "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court" (336 U.S. at 683) and as to which there was no evidence. And see *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960), a criminal case, in which the Court granted certiorari to review not the sufficiency of the evidence but "whether this conviction rests upon any evidence at all."

The Fifth Circuit, in its decision on rehearing (Appendix B, infra), purported to answer Coastal's criticisms. It first said (p. 18a, infra) that it was satisfied that the issue had indeed been raised below. We find it difficult to deal with this, since while we know it to be a fact that the issue was never mentioned in the trial court, we do not expect this Court to grant certiorari merely to review such an error (even though it is a due process issue). But the Fifth Circuit went on to say, in footnote 1—having already shipped the case over to the Florida Supreme Court to see whether or not there was any evidence on the issue—that "it strikes us there is little real controversy about the facts. There is virtual agreement on footage drilled by lease, well and location. [Citing a chart in Coastal's brief, prepared on appeal, to which the

Trustees had never agreed.] The problem is the legal significance of these facts . . ."

Unfortunately for the Fifth Circuit's attempt to fill the evidentiary gap in this manner, there is indeed a controversy—the greatest controversy—on this point. It is absolutely untrue that there are facts in the record on this issue. Indeed, the Trustees have never claimed that there are any such facts in the record. There is no factual underpinning at all for determination of this issue by any appellate court.

And still another problem arises when an appellate court contravenes the usual rule against entertaining new issues. If that new issue would trigger the compulsory counterclaim rule, what will be the result if no such counterclaim can be filed? Will the claim be barred? If the Trustees had made the claim in the District Court that Coastal's leases had been invalid for many (perhaps twenty or more) years, Coastal not only could have counterclaimed for a refund of rental fees paid to the Trustees and expenditures made upon these leases, a total of over sixteen million dollars ($16,000,000.00), but such a claim would have been compulsory under F.R. Civ. P. 13) (a). It is established that a failure to assert a compulsory counterclaim results in barring that claim, on principles allied to res judicata. *United States* v. *Eastport Steamship Corp.*, 255 F.2d 795 (C.A. 2d, 1958); see 3 *Moore's Federal Practice* (2d Ed.) ¶ 13.12[1], collecting cases. But a Court of Appeals is not a trial court; no counterclaims can be pleaded there. Will Coastal's counterclaim vanish if the Trustees are allowed to retain this new issue? This is a problem important whenever an appellate court, without careful analysis of the results,

decides to entertain an issue not asserted in the trial court.

A jury trial issue may similarly be triggered (for the first time) in the Court of Appeals by the allowance there of a new issue as to which there is a right to trial by jury. A jury trial right may of course arise, in a case not otherwise a jury case, when a counterclaim is filed. *Beacon Theaters, Inc.* v. *Westover,* 359 U.S. 500 (1959). In a district court there is no problem; the jury demand can be filed whenever the right arises. *Bereslavsky* v. *Caffey,* 161 F.2d 499 (2d Cir., 1947), cert. den. 332 U.S. 770; *Bereslavsky* v. *Kloeb,* 162 F.2d 862 (6th Cir., 1947), *cert. den.* 332 U.S. 816. But what if the forum is a Court of Appeals?

Other problems of this nature may similarly arise if Courts of Appeal are permitted to indulge in a loose practice of entertaining new issues on appeal. This Court should give guidance in this regard.

### 3. The Magnitude of This Case

While the magnitude of a case is perhaps not per se a reason for this Court to grant certiorari, there seem to have been instances in which the sheer size of the case has been the chief factor. See e.g., *Dalehite* v. *United States,* 346 U.S. 15 (1953) (the famous Texas City disaster case, with potential damages in the hundreds of millions); *Alaska* v. *American Can Co.,* 358 U.S. 224 (1959) (the fiscal importance to Alaska); cf. *United States* v. *Zazove,* 334 U.S. 602 (1948). The case at bar involves assets potentially larger than any of those cases. What is involved here, if the Trustees are successful, is the forfeiture of those vast assets.

As is shown by the map printed herein, this case involves oil and gas (and mineral) leases covering virtually the entire west coast of Florida ten miles out into the Gulf of Mexico, as well as large areas of lakes and a river. Those leases include over 4,500,000 acres, an area larger than that of a number of States. The map shows that nearby offshore oil and gas leases, exclusive of other minerals, covering 512,000 acres (approximately one-ninth the size of Coastal's leases), sold by the federal government in December of 1973, brought $1.49 billion in bids at a time before oil and gas prices had risen to their present levels. That figure, at today's prices, would unquestionably be well over two billion dollars. Without claiming that Coastal's leases should be valued at nine times that figure, it is obvious that the areas covered by Coastal's leases possess potential values in the billions of dollars.[8] This, then, is one of the largest matters ever to be in litigation in the federal courts.

Possible forfeiture of these vast assets is involved here. This, together with the other points we have made, which are troubling issues in the administration of the federal judicial system, should impel this Court to grant certiorari to review the action of the Fifth Circuit.

Alternatively, petitioner moves that this petition for writ of certiorari be treated as a petition for a writ of mandamus, and that the Fifth Circuit be directed forthwith to vacate its certification order as being outside the scope of its powers, in that it has certified

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[8] Mobil Oil Corporation, the third largest oil company in the United States, has a right to a one-half interest in these leases upon completion of certain contractual obligations.

questions of fact and not of law to the Supreme Court of Florida.

Respectfully submitted,

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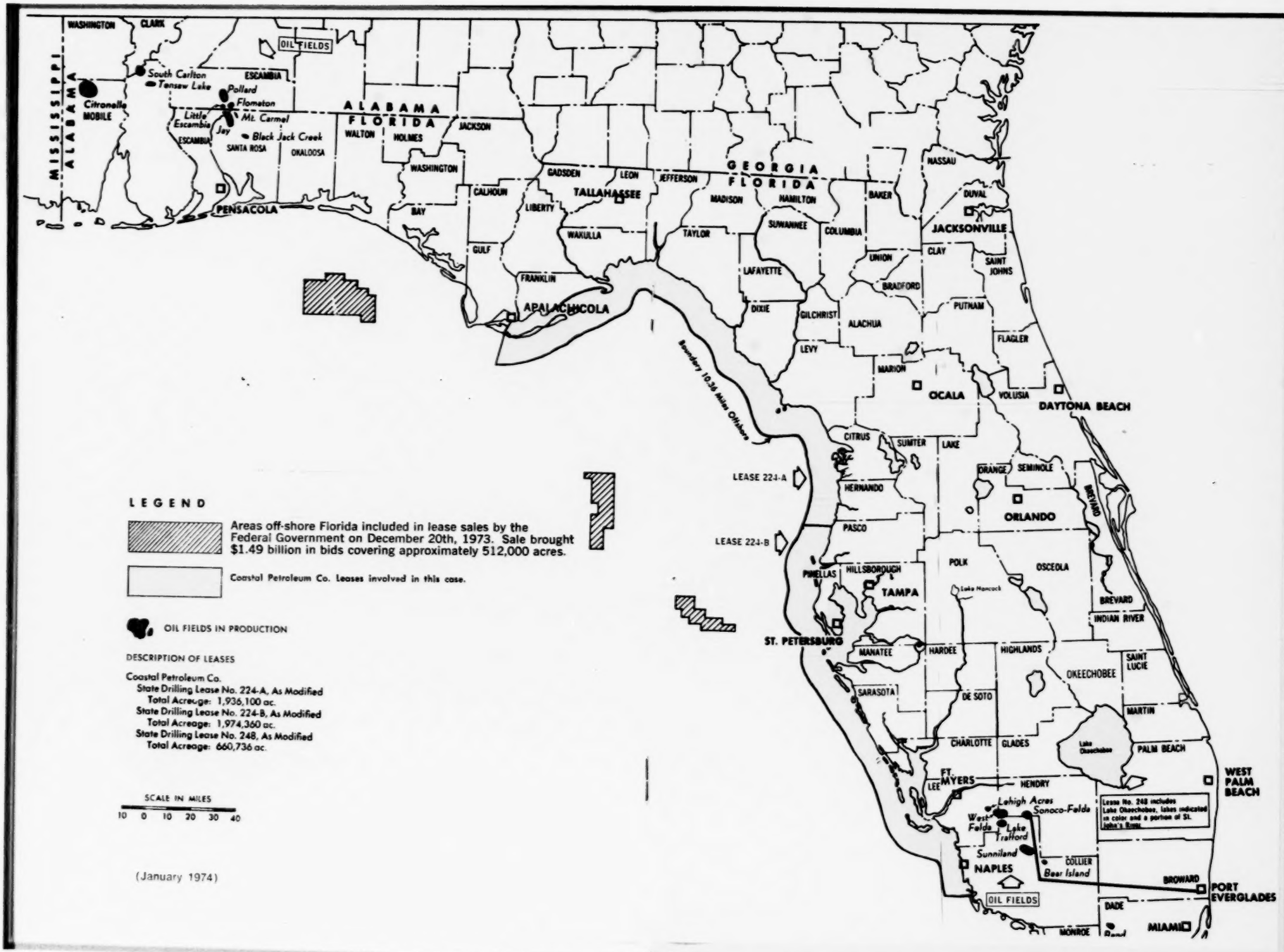
WASHINGTON
CLARK
OIL FIELDS
MISSISSIPPI
ALABAMA
South Carlton
Tensaw Lake
ESCAMBIA
Pollard
Citronelle
MOBILE
Flomaton
ALABAMA
FLORIDA
Little Escambia
Jay
Mt. Carmel
Black Jack Creek
ESCAMBIA
SANTA ROSA
OKALOOSA
WALTON
HOLMES
JACKSON
WASHINGTON
PENSACOLA
BAY
CALHOUN
GADSDEN
LEON
TALLAHASSEE
JEFFERSON
GEORGIA
FLORIDA
NASSAU
LIBERTY
MADISON
HAMILTON
BAKER
DUVAL
JACKSONVILLE
WAKULLA
TAYLOR
SUWANNEE
COLUMBIA
GULF
CLAY
SAINT JOHNS
LAFAYETTE
UNION
BRADFORD
FRANKLIN
APALACHICOLA
DIXIE
GILCHRIST
ALACHUA
PUTNAM
FLAGLER
LEVY
MARION
OCALA
VOLUSIA
DAYTONA BEACH
Boundary 10.36 Miles Offshore
CITRUS
SUMTER
LAKE
ORANGE
SEMINOLE
LEASE 224-A
HERNANDO
ORLANDO
BREVARD
LEASE 224-B
PASCO
POLK
OSCEOLA
PINELLAS
HILLSBOROUGH
TAMPA
Lake Hancock
BREVARD
INDIAN RIVER
ST. PETERSBURG
MANATEE
HARDEE
HIGHLANDS
SAINT LUCIE
OKEECHOBEE
SARASOTA
DE SOTO
MARTIN
CHARLOTTE
GLADES
Lake Okeechobee
PALM BEACH
FT. MYERS
LEE
HENDRY
WEST PALM BEACH
Lehigh Acres
Sonoco-Felda
West Felda
Lake Trafford
Lease No. 248 includes Lake Okeechobee, lakes indicated in color and a portion of St. John's River
Sunniland
COLLIER
Bear Island
NAPLES
BROWARD
PORT EVERGLADES
OIL FIELDS
DADE
MONROE
MIAMI
LEGEND
Areas off-shore Florida included in lease sales by the Federal Government on December 20th, 1973. Sale brought $1.49 billion in bids covering approximately 512,000 acres.
Coastal Petroleum Co. Leases involved in this case.
OIL FIELDS IN PRODUCTION
DESCRIPTION OF LEASES
Coastal Petroleum Co.
State Drilling Lease No. 224-A, As Modified
Total Acreage: 1,936,100 ac.
State Drilling Lease No. 224-B, As Modified
Total Acreage: 1,974,360 ac.
State Drilling Lease No. 248, As Modified
Total Acreage: 660,736 ac.
SCALE IN MILES
10 0 10 20 30 40
(January 1974)

# APPENDIX

## Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2589

COASTAL PETROLEUM COMPANY, *Petitioner-Appellee,*

v.

SECRETARY OF THE ARMY OF THE UNITED STATES OF AMERICA, ET AL., *Respondents,*

TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA, *Respondent-Appellant.*

*Appeals from the United States District Court for the Southern District of Florida*

(December 6, 1973)

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges.

BROWN, Chief Judge: This case presents another of those instances in which the Federal bench is called upon by the *Erie* siren call to divine the correct substantive principle of State law from the cold, plain words of a State statute. While it is clear that it is incumbent upon us as judicial officers of the United States to adjudicate cases and controversies properly within the jurisdiction of our court, we are bound too by the chords of Federalism to give proper deference to the laws of the several States and the final power and duty of the judicial officers of those States to interpret those laws. Fortunately, the laws of the State of Florida and the rules of its Supreme Court allow us to accommodate our desire to correctly apply the rule of law of the forum State to the case currently before the court by certifying these matters to the Supreme Court of Florida.

What started out as a contest between Coastal (Lessee) and the United States Army Engineers to obtain a permit to drill for limestone in Florida's Great Lake

Okeechobee ended up in its present simple, but decisive, struggle between Coastal (Lessee) and Florida.[1] At stake are not only the likelihood of millions of dollars viewed from a commercial perspective, but the conservation of this great natural resource by Florida for its citizens,[2]

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[1] Through the Florida Board of Trustees for the Internal Improvement Trust Fund.

[2] In denying the right to drill for limestone despite his holding that the leases were valid and covered minerals, not just oil and gas, the trial judge declared:

> Having determined that Coastal has established its legal right to proceed with its mining operations in Lake Okeechobee I herein set forth the reasons why I decline to enforce this right in the manner which Coastal has requested. The following statement from the Trustees describes the importance of Lake Okeechobee to the State of Florida:
>
> "South Florida, with its expanding population already zooming into the millions, in a 'water-short' area; that Lake Okeechobee—a huge but shallow basin with a limestone floor—is the only place in the entire area where fresh water can be stored in sufficient quantities to meet the fluxuating needs of that population, the needs of Florida's unique and priceless Everglades National Park, and the needs of the tremendously valuable central and south Florida agricultural industry; that the fresh water in Lake Okeechobee is presently of high purity and of quality (if not quantity) to meet the demands made upon it; and finally that the removal of large portions of the limestone floor of the lake will weaken the barrier which separates the pure fresh water in the Lake from impure, saline water lying under pressure beneath the rock, thereby dangerously jeopardizing the fresh water supply of the entire Central and South Florida area."
>
> Evidence was presented as to the possible effect of Coastal's operations on the quality of the water supply emanating from the Lake and as to the weakening of the barrier which prevents saline intrusion. . . . I find this evidence as to the possible effects persuasive. It is by no means absolute but the balancing of interests between Coastal, the Trustees, and the people of the State of Florida lends weight to the prevention of such mining operations by a private company.

and in which it has at least for the moment a staunch ecological ally.[3]

Validity of the underlying leases turns on the construction and application of Florida statutes and the actions of Coastal and the Trustees under the leases. Consequently we are dealing not only with Florida law—over which, unlike a diversity federal court, *Ford Motor Co.* v. *Mathis*, 5 Cir., 1963, 322 F.2d 267, 269, Florida has not only the latest, but the *last* word—but with matters of great public

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[3] Indeed the suit was precipitated to challenge the Department of the Army's refusal to grant a permit for essentially like reasons which stated:

> "The application of the Coastal Petroleum Company dated 29 August 1968 for a Department of the Army permit to mine limestone from an area of Lake Okeechobee has been given careful consideration at all levels of the Department of the Army.
>
> Confirming advance information furnished your company by telegram on 12 August 1969, I have to inform you that your application must be, and hereby is denied.
>
> This denial is based on the following considerations:
>
> a. You have been unable to show that you have a legal right to do the work proposed under the permit in view of the action of the Trustees of the Internal Improvement Fund of the State of Florida on 27 May 1969 declaring Drilling Lease No. 248, as modified, to be in default in its entirety and the lease and all the lessee's rights thereunder to be terminated;
>
> b. Issuance of a permit is unanimously and vigorously opposed by all responsible local, State and Federal agencies, local and State officials and Florida Congressmen, and recognized conservation groups; and
>
> c. Issuance of the permit would result in substantial harmful effect upon fish and wildlife resources, ecology, conservation, and the water quality of Lake Okeechobee.

concern. Fortunately for Florida[4] matters of such public moment need not be exposed to the risk of an *Erie* guess by Federal Judges, no matter how competent and conscientious. For thanks to its enlightened procedure we now, as we have done many times,[5] certify this to the Supreme Court of Florida.

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[4] Louisiana has recently adopted such a certification procedure. United States v. Buras, 5 Cir., 1972, 475 F.2d 1370, 1371 (Brown, C.J., dissenting), cert. denied, 1973, — U.S. —, — S.Ct. —, — L.Ed.2d —.

[5] Allen v. Estate of Carman, 5 Cir., 1971, 446 F.2d 1276, on certification, Fla., 1973, 281 So. 2d 317, on receipt of answers to certification, 5 Cir., 1973, — F.2d — (No. 73-30472, Nov. 1, 1973); National Education Association, Inc. v. Lee County Board of Public Instruction, 5 Cir., 1971, 448 F.2d 451, on certification, Fla., 1972, 260 So.2d 206, on receipt of answers to certification, 5 Cir., 1972, 467 F.2d 447; Gordon v. The John Deere Company, 5 Cir., 1971, 451 F.2d 234, on certification, Fla., 1972, 264 So.2d 419, on receipt of answers to the certification, 5 Cir., 1972, 466 F.2d 1200; Boyd v. Bowman, 5 Cir., 1971, 443 F.2d 848, on certification, Fla., 1971 256 So.2d 1. On receipt of answers to certification, 5 Cir., 1972, 455 F.2d 927. Martinez v. Rodriquez, 5 Cir., 1968, 394 F.2d 156, on certification, Fla., 1968, 215 So.2d 305, on receipt of answers to certification, 5 Cir., 1969, 410 F.2d 729; Life Ins. Co. of Va. v. Shifflet, 5 Cir., 1967, 370 F.2d 555, on certification, Fla., 1967, 201 So.2d 715, on receipt of answers to certification, 5 Cir., 1967, 380 F.2d 375; Hopkins v. Lockheed Aircraft Corp., 5 Cir., 1966, 358 F.2d 347, on certification, Fla., 1967, 201 So.2d 743, on receipt of answers to certification, 5 Cir., 1968, 394 F.2d 656; Green v. American Tobacco Co., 5 Cir., 1962, 304 F.2d 70, on rehearing, 304 F.2d 85, on certification, Fla., 1963, 154 So.2d 169, on receipt of answers to certification, 5 Cir., 1963, 325 F.2d 673, cert. denied, 1964, 377 U.S. 943, 84 S.Ct. 1349, 12 L.Ed.2d 306, on appeal after retrial, 391 F.2d 97, rehearing en banc denied, 1969, 409 F.2d 1166; Clay v. Sun Ins. Office, Ltd., 1960, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170, on certification upon remand, Fla., 1961, 133 So.2d 735, on receipt of answers to certification, 5 Cir., 1963, 319 F.2d 505, reversed, 1964, 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed.2d 229. See W.S. Ranch Co. v. Kaiser Steel Corp., 10 Cir., 1968, 388 F.2d 257, 265 (dissenting opinion), reversed, 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835.

For our purposes we can sketch the background broadly with no purpose to hem in the Supreme Court of Florida. Pursuant to its statutory authority to lease state lands for the development of sources of oil, gas, and other minerals, Florida Statutes, Chapter 253, the Florida Board of Trustees for the Internal Improvement Trust Fund leased several tracts of land [6] at the bottom of Lake Okeechobee to Coastal's assignor in the early 1940's. The leases have been the subject of prior litigation.[7] The Trustees filed suit in 1945 seeking a declaratory judgment to the effect that the leases were valid. In *Watson* v. *Holland,* 1945, 155 Fla. 342, 20 So.2d 388, the Supreme Court of Florida was again presented with an opportunity to rule on the leases. That court held in *Collins* v. *Coastal Petroleum Co.,* Fla., 1960, 118 So.2d 796, that the leases encompassed the production of all mineral resources, not merely oil and gas.

As the case comes to us, decision on the validity of the leases turns on whether Coastal has complied with the exploratory and developmental drilling obligations imposed by certain Florida statutes and the terms of the resulting leases. The question was not so much *what*—from a physical operational standpoint—had been done, but whether such activities undertaken on the various tracts and leases satisfied the statutory/lease obligations as to the specific leases at issue (see note 6, *supra*). This is entirely a Florida question on which there are not *Erie* lights which justify risking these vital interests by an erroneous decision.

We again followed our experience-born judgment that counsel can best prepare the certificate of the statement and question to be certified (see cases in note 5, *supra*). A letter

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[6] Three separate tracts of land are involved. The leases designate them by number as 224-A, 224-B, and 248.

[7] Coastal contends that the history of the litigation concerning these lands, particularly the *Collins* decision, *supra*, is res judicata as to the validity of the leases. The Trustees counter by asserting that at no time has the issue of invalidity for failure to comply with the requirements of Florida Statutes, § 253.55, been before the court.

directive [8] from our Clerk called on counsel to formulate a statement with questions as to which both parties agreed with points of difference being pinpointed with supporting memoranda pro and con for choices by this Court. After months of strenuous efforts and numerous meetings this was filed in a way that has enabled us readily to make and indicate our choices.[9]

Some general comments are in order. Coastal insists that compliance with exploratory drilling obligations was not in the case below and there are insufficient facts in the record upon which to meaningfully certify the related questions. There are several answers. First, this was expressly put in direct issue in the complaint, answer and various cross claims.[10] Indeed, it was this very contention of the Board of

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[8] This letter directive of August 28, 1972 and supplements are a part of the record being certified insofar as the Supreme Court of Florida deems them relevant to an understanding of our choices in the final certificate.

[9] The "Proposed Joint Certification (with differences delineated)" is a part of the certified record. The points of differences are interspersed at appropriate places in parallel columns. The certificate appended includes only the choice made together with footnotes indicating specifically each choice and the addition of some made by us out of an abundance of caution.

[10] The Trustees' "counter claim" alleged:

> 3. Coastal has failed and refused to comply with the terms of the lease relating to the drilling of wells during each drilling period and Coastal has not, pursuant to the express terms of Drilling Lease 248, as modified, drilled upon lands alleged by Coastal to be included in the said Drilling Lease 248, as modified, a minimum of 12,000 feet of wells during each drilling period to depths for each well of not less than 6,000 feet "unless oil, gas or sulphur has been found in paying quantities or igneous rock, or paleozoic formation, or formations not susceptible of being drilled with first-class drilling equipment is encountered as a lesser depth." (App. 47).

Coastal responded by a categorical denial (par. III, App. 51) which was expanded in its "affirmative defense" (App. 52):

> Coastal Petroleum Company has drilled or caused to be drilled all of the footage required under the terms of Lease No.

Trustees which the Department of the Army regarded as decisive (see note 3, par. 2).

Next, the record is filled with voluminous schedules, charts and tabular materials showing what Coastal has done on these and *other* leases which Coastal urges they were allowed by the Trustees to "borrow" to validate the leases here in question.[11]

And to cap it all off, in the jointly acceptable portion of the appended certificate (par. 2) this claim and denial is precisely set forth.

Finally, the Supreme Court of Florida is well equipped to handle factual matters as witness its most recent opinion in response to our certification. *Allen* v. *Estate of Carman*, Fla., 1973, 281 So.2d 317 in response to certification, 5 Cir., 1971, 446 F.2d 1276 and our opinion after certification, 5 Cir., 1973, —— F.2d —— (No. 30472, Nov. 1, 1973, pp. 3-4) as to the question of the Florida Court's resolution of factual disputes. The Supreme Court has plenary power to determine whether there is from its Florida point of view an adequate basis for answering the questions.[12]

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248, as well as [847] Leases 224-A and 224-B as described and referred to and made a part of Lease No. 248, for footage credit as set forth in Article 20 of Lease No. 248, and all annual delay rentals as provided for in said leases have been duly paid on or before the due dates of the respective leases, including Lease No. 248, from the first due date down to and including the rentals due on Lease No. 248 on December 19, 1968. Exhibit "B" attached hereto and made a part hereof shows the payment of the rentals and the receipt therefor duly made and entered on November 15, 1968, by the Trustees of the Internal Improvement Fund and the receipt was signed by Robert C. Parker, Director. By reason of the foregoing, the Trustees of the Internal Improvement Fund of the State of Florida are in all things estopped to deny the validity of Lease No. 248, as well as the other leases referred to in 248.

[11] See, e.g., Trustees brief pp. 8-13 and the responsive tabular drilling history in Coastal's brief, pp. 7-9.

[12] This includes adapting conditional answers to such precise issues presumably for subsequent determination by the Federal Court as prescribed by it.

## QUESTIONS CERTIFIED

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF FLORIDA, PURSUANT TO § 25.031, FLORIDA STATUTES 1971, AND RULE 4.61, FLORIDA APPELLATE RULES.[1]

To the Supreme Court of Florida and the Honorable Justices thereof:

It appears to the United States Court of Appeals for the Fifth Circuit that the above-styled case in this Court involves a question or proposition of the law of the State of Florida which is determinative of the cause, and there appear to be no clear, controlling precedents in the decisions of the Supreme Court of Florida. This Court hereby certifies the following questions of law to the Supreme Court of Florida for instructions concerning said questions of law, based on the facts recited herein, pursuant to § 25.031, Florida Statutes 1971, and Rule 4.61, Florida Appellate Rules as follows:

1. *Style of the Case*

The style of the case in which this Certificate is made is *Coastal Petroleum Company, Appellee* v. *Secretary of the Army of the United States, and Trustees of the Internal Improvement Trust Fund of the State of Florida. Appellants,* being Case No. 71-2589, United States Court of Appeals for the Fifth Circuit; such case being an appeal from the United States District Court for the Southern District of Florida.

2. *Nature of the Case*

This is a case in which Coastal Petroleum Company brought suit in August, 1968, in the Federal District Court,

[1] To retain the Certificate's self-sufficiency the notes are numbered separately from the accompanying (and incorporated) opinion.

against certain federal officials and state officials, seeking to compel the issuance of a federal permit for drilling for limestone under its Drilling Lease 248. The Trustees of the Internal Improvement Trust Fund, defendants in the case, filed on April 23, 1969, an answer containing a counterclaim alleging that Lease 248 should be declared void for failure of Coastal to comply with the drilling obligations of the lease. Coastal then, on May 12, 1969, filed a counterclaim to that counterclaim, seeking a declaration that all three of its Leases, Lease No. 224-A, Lease 224-B and Lease 248 be declared valid and binding leases and asserting that Coastal had fully complied with each and every term, condition and obligation of the leases. On May 6, 1969, the Trustees filed an action in state court seeking a declaration that all three leases should be declared void as against public policy; this action was then removed to the federal court and consolidated with Coastal's earlier action there. The leases were held valid by the District Court.

On appeal by the Trustees, all issues have been eliminated except the question as to whether Coastal's three leases are void for a failure by Coastal to comply with the drilling requirements.

3. *Statement of Facts*

Title to publicly-owned lands, including bottoms of salt and fresh waters, of the State of Florida, is irrevocably vested in the Trustees of the Internal Improvement Fund of the State of Florida for management and sale. Florida Statutes 253.01 and 253.02.

In 1941, Arnold Exploration, Inc., renamed Coastal Petroleum Company, entered into a contract with the Trustees which was designated "Exploration Contract for Oil, Gas and Minerals and Option to Lease". This contract was entered into pursuant to the authority of the Trustees granted by Chapter 20,680, Laws of Florida, Acts of 1941.

In 1944 the Trustees and Coastal entered into Drilling Leases 224-A (App. Ex. 26) and 248 (App. Ex. 44, 46); in

1946 they entered into Drilling Lease 224-B (App. 73) [App. Ex. 23, 27]. Each recites that it was executed pursuant to the exploration contract above-mentioned and specifically refers to Chapter 20,680. These contracts were re-executed in 1947.[2]

In 1945, Chapter 22,824 of the Laws of Florida was enacted which granted new and different authority to the Trustees to issue oil and gas leases.

The change in the 1945 Statute, which is pertinent to the issue at bar, relates to drilling requirements: the 1941 Statute required one test well to be drilled on the lands leased within the first five-year period, and one additional well in each succeeding five-year period. The 1945 Statute required one test well to be drilled every two and one-half years each to a minimum depth of 6,000 feet.[3]

Each lease stipulates that if any sentence, paragraph, clause or provision of the re-executed drilling lease is invalid by virtue of a Florida law enacted subsequent to October 4, 1941, then the provisions of the original lease take precedence over the re-executed lease.[4]

The only leases physically in the record are the re-executed leases of 1947. They require one test well to be drilled on, or continguous to, each drilling block located in the lease within the first five-year period of the lease and the drilling of at least one additional well in each succeeding five-year renewal period upon, or contiguous to, each separate drilling block, each well to be drilled to a depth of not less than 6,000 feet. Each lease states: "If no well shall be commenced within the first five-year period, all rights to renew this lease shall become unenforceable and the entire

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[2] Adopting Trustee's Contention Difference No. 1.

[3] Adopting Trustee's Contention Difference No. 2.

[4] Adopting Trustee's Contention Difference No. 3 apparently inadvertently omitted in final draft.

lease shall be void, and if during each subsequent five-year renewal period hereof no well or wells be commenced as required herein, such renewal lease contract in its entirety shall become terminated as to any area in such drilling block not in a status conformable in this particular with the requirements of this lease".

The pattern of the three Coastal leases is that a "primary term" of five years is prescribed in each lease. If, at any time within that period, Coastal satisfied its two lease obligations of (1) drilling, and (2) rental payments, another five-year period would automatically start running, and if Coastal satisfied the lease obligations at any time within the second five-year period, another such period would commence to run, and so on for successive five-year periods; the fifth five-year period has not yet ended because the District Court supended all obligations under the leases until the termination of this litigation.

The 1941 and 1945 Statutes both contain provisions providing that the "leases shall be void" thereunder if certain drilling requirements are not met within each term. The leases also contain provisions that they "shall be void" if certain drilling obligations are not met.[5]

It is uncontested that Coastal has drilled more total footage than these leases require. Some of that footage was on other lands (on which the Trustees had a one-eighth overriding royalty) not covered by Coastal's leases.

Throughout four full five-year periods of each lease, the Trustees repeatedly adopted formal resolutions to the effect that Coastal had satisfied all its drilling obligations. Some of the resolutions related to footage on other lands (on which the Trustees had a one-eighth overriding royalty) not covered by Coastal's leases, and credited some of this footage towards satisfaction of the obligation of the leases. Without such credits from such other lands, the Trustees

[5] Adopting Trustee's Contention Difference No. 4.

would not have been able to adopt these resolutions of compliance.

Coastal has never complied with the drilling obligations imposed by the 1941 and 1945 Statutes or by the leases themselves (App. Ex. 66-71).[6]

The Trustees have certified by formal resolution many times during the life of these leases, that Coastal—as a result of allocations or credits of footages drilled in areas not covered by these leases—has met all its drilling obligations and all its rental payments. (App. Ex. 66-71) [6]

During the fourth five-year period, Coastal did not fulfill the drilling requirements of Leases 248 and 224-A, and the Trustees did not certify that the drilling requirements had been met as to those Leases 248 and 224-A. (App. Ex. 71, 67).[6]

Following those certifications by the Trustees, Coastal has continued to expend monies and pay rentals under the leases, and Coastal has entered into contracts with other companies for drilling pursuant to which large expenditures were made. The most recent example of this was in 1965 when Coastal contemplated entering into a contract with Socony Mobil Oil Company for drilling under these leases. This contract (which, as the District Judge in this case found, "stated that the leases were not encumbered") was presented to the Trustees in advance under a provision of each lease requiring written consent in advance from the Trustees. By formal resolution, the Trustees gave their consent and approved the contract.

An employee of the Trustees then wrote a letter to Mobil advising Mobil that Coastal possessed drilling credits available for satisfying the lease requirements.

Following the Trustees' formal resolution and receipt of the letter described above, Mobil and Coastal proceeded

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[6] Adopting Trustee's Contention Difference No. 5.

under the contract, and Mobil expended over three million dollars ($3,000,000) on this matter.

The 1941 statute states that a test well shall be drilled on each lease within each five-year period whereas the 1945 statute requires one test well to be drilled every two and one-half years, each well to have a minimum depth of 6,000 feet.[7]

In reply to Coastal's contention that the 1941 statute was never raised by the Trustees in the trial court, this is not a proper question to be certified to the Florida Supreme Court as it is asking the Fifth Circuit to tell the Florida Supreme Court that it is impossible to answer some questions because of lack of evidence.[8]

The three leases require certain annual rental payments to the Trustees aggregating $69,600.32. Over the period of these leases, some twenty-five years, Coastal Petroleum Company has paid and the Trustees have accepted the sum of one million, five hundred five thousand, one hundred forty-six dollars ($1,505,146.00) as rental. The total expenditures made by Coastal and its associates pursuant to these leases, including the above rental payments, amount to the sum of sixteen million, three hundred seventy thousand, ninety-seven dollars and seventy-four cents ($16,370,097.74).

The leases also require that royalties of one-eighth of production be paid the Trustees by Coastal. Over the period of these leases, no royalties have been accrued or paid, since there has been no production.

The leases each contain a notice provision to the effect that a breach of lessee's obligations shall not work as a

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[7] Adopting Trustee's Contention Difference No. 6, apparently inadvertently omitted in final draft.

[8] Adopting Trustee's Contention Difference No. 7, this omission was undoubtedly intentional and while of doubtful relevance in this certificate it has been included by us for completeness.

forfeiture of the lease or be ground for cancellation, except as forfeitures may be imposed by laws of the State, and further providing that if the Trustees believe at any time that lessee is not complying with the lease, they shall notify lessee in writing of the facts relied upon as constituting a breach, and lessee (if in default) shall have thirty days in which to commence compliance.

No written notification was given Coastal by the Trustees of facts claimed by the Trustees to constitute a breach of the lease, other than the complaint filed by the Trustees in the state court and the answer and counterclaim filed by the Trustees in the Federal Court.

The parties to this action have been in litigation concerning these leases at least five times. Those cases are *Watson* v. *Holland,* 155 Fla. 342, 20 So.2d 388 (1944); *United States* v. *Certan Lands in Citrus County, Florida,* C.A. No. 162, United States District Court for the Southern District of Florida, decided November 2, 1954; *Collins* v. *Coastal Petroleum Company,* 118 So.2d 796 (Dist. Ct. App. Fla. 1960), certiorari discharged, 125 So.2d 200; *Coastal Petroleum Company* v. *Bryant,* Chancery No. 18569, Circuit Court of the Second Judicial District, Leon County, Florida, decided May 17, 1963; and *Burns* v. *Coastal Petroleum Company,* 194 So.2d 71 (Fla. 1st Dist., 1967).

The Trustees did not, in any of the above cases, file a counterclaim to declare Coastal's leases void for failure to meet its drilling obligations, or plead or even suggest that Coastal had failed to meet its drilling obligations under a statute or under its leases. However, Coastal in the above cases never sought a declaration of those same issues.

In still another case in which Coastal was not a party, and in which the issues in the present case were not involved or adjudicated, *Kirk* v. *Flowers,* No. 6720, Circuit Court of the Twelfth Judicial Circuit in and for Charlotte County, Florida, decided in 1967, the Trustees asserted the

validity and primacy of Coastal's leases in attacking a County zoning ordinance which would have barred offshore well drilling. The Trustees told the court that because the State's authority was preemptive beyond three miles from the shore, their power to execute leases under State law was superior to the County's zoning power; that Coastal's leases were valid; and that if the ordinance was not invalidated, the Trustees would be obligated to refund all of Coastal's rental payments and other expenses incurred by Coastal and its associates. The Court held the County regulation invalid because the subject matter was exclusively granted to the State, the area involved being beyond the three mile limit from Charlotte County.

*QUESTIONS TO BE CERTIFIED*

1. Are Coastal's rights and obligations governed by the 1941 statute, the 1945 statute, or by both statutes? Both 1941 and 1945 statutes are to be considered.[9]

2. Where the State of Florida has granted oil, gas and mineral leases under the authority of a statute, which contains express provisions and criteria as to drilling requirements and performance standards:

(i) Would the leases be void as a result of non-compliance with the drilling obligations imposed by (a) said statute, or (b) the leases themselves?

(ii) If so, could the Trustees, by resolution, effectively excuse non-compliance with drilling obligations?

(iii) Does an employee of the Trustees, holding no office, have the power to waive the requirements of said statute or the leases by writing an advisory letter?[10]

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[9] Adopting Coastal's Contention Difference No. I. We would add that omission of 1941 statute in Clerk's directive (note 8, *supra* (opinion) was inadvertent.

[10] Adopting Trustee's Contention Difference No. III.

3. Does failure to fulfill statutory drilling requirements automatically cancel the leases?

(i) If not, is written notice by the Trustees a condition precedent before the leases become void?

(ii) If so, were the pleadings herein sufficient written notice by the Trustees? [11]

Does paragraph 22 of each of Coastal's leases, embodied in each lease prior to its modification, permit Coastal to have a reasonable time to comply with statutory requirements in the event a sentence, paragraph, clause or provision of the modified lease is held invalid? [12]

4. Does failure to comply with the statutory and lease drilling requirements, if proven, automatically determine that the lessee has not operated as a reasonably prudent operator?

5. Are these issues foreclosed by principles of res judicata or collateral estoppel, or similar principles, by reason of the Florida court cases (cited earlier) in which Coastal and the Trustees have both been parties?

6. Can the Trustees, as a public body, be foreclosed and should they be foreclosed, by reason of equitable estoppel on the basis of the facts set forth above?

7. Are the Trustees foreclosed from urging invalidity of the leases by reason of the Florida court rules requiring the filing of compulsory counterclaims?

8. Are the Trustees foreclosed from urging forfeiture of the leases by reason of the so-called "doctrine of preclusion of inconsistent positions" because of the position they took in any of the cited cases?

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[11] Adopting Trustee's Contention Difference No. IV.

[12] Adopting Coastal's Contention Difference No. V.

The entire record in this case, together with copies of the briefs of the parties in this Court, the letter directive, memoranda on certification, proposed certification with differences and all other papers are transmitted herewith.[13]

[13] We repeat again what we often have said:

"The particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified in this case. This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts." Martinez v. Rodriquez, 394 F.2d 156, 159, n. 6.

## APPENDIX B

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

(Filed March 29, 1974.)

* * * * * * * * * * *

Appeals from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion December 6, 1973, 5 Cir., 1973, 489 F.2d 777).

Before BROWN, Chief Judge, and BELL and MORGAN, Circuit Judges.

PER CURIAM:

In a vigorous petition for rehearing Coastal strongly protests the inclusion of the validity of the leases under the 1941 statute in the Certification and Questions addressed to the Florida Supreme Court. In support, Coastal asserts that the question of compliance with the 1941 statute was never brought in question in the Court below and, more significantly, there was no evidence pertaining to that issue. We called for response by the Trustees which we deem adequately "detailed" despite the somewhat stringent criticisms of this response made by Coastal.

On the response and the record we are of the clear view that compliance with the 1941 statute was brought specifically and pointedly to the trial court's attention. Being leases made pursuant to the 1941 and 1945 statutes the District Court's holding that the leases were valid necessarily contemplates validity under the underlying statute. Whether footage evidence was directed to compliance with the lease, the statute, or both, and whether it affords a sufficient factual basis for resolving the consequent questions of Florida law must be left in the first instance to the Florida Supreme Court.[1]

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[1] Without intimating any opinion it strikes us that there is little real controversy about the facts. There is virtual agreement on footage drilled by lease, well and location. See, for example,

That Court is fully capable of determining this issue. Indeed, for us to pass upon it initially would be an attempt to decide the very Florida questions which we have certified. But to eliminate any possible intimation that we are deciding the ultimate issue we delete the following portion of the certificate:

"Coastal has never complied with the drilling obligations imposed by the 1941 and 1945 Statutes or by the leases themselves (App. Ex. 66-71).[6]"[2]

Although probably not so intended the petition for rehearing makes even plainer that this is now wholly a Florida case. What started out as a plausible claim against the United States Corps of Engineers to give federal jurisdiction has now become the very small tail wagging the very big dog as the controversy shifts[3] from mining limestone

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"Chart Showing Drilling History" insert p. 7, Coastal's initial brief (November 15, 1971) which Coastal describes as a "Chart, compiled from exhibits * * * [and] consisting almost entirely of official Minutes of the Trustees". The problem is the legal significance of these facts under the 1941, 1945 statutes, the leases, or both, as set forth in the questions certified.

[2] Footnote 6 read: "6. Adopting Trustee's Contention Difference No. 5."

To retain the original structure and so the Florida Supreme Court can see, as in the case of the differences of fact statements and questions of law, we are not mechanically rewriting the certificate but it is deleted as though physically removed.

[3] See Coastal's brief on rehearing:

It seems clear, from the Court's discussion on pages 2-4, that the Court believes that the case still involves the drilling of limestone in Lake Okeechobee. The ecological discussion on those pages is devoted to that issue. It further seems clear, from footnote 6 on page 5, that the Court is under the astonishing impression that all three leases involved here relate to Lake Okeechobee. But the question of drilling for limestone in Lake Okeechobee without Government consideration of ecological matters has long since passed out of the case, having been foreclosed by the trial judge's ruling (from which no appeal was taken), and all that is involved now is the basic validity of these leases, the vast bulk of which do not relate at all to Lake Okeechobee.

from beautiful Lake Okeechobee to the energy crisis scramble for 4½ million acres of off-shore leases.[4]

Fortunately, what has now become exclusively a Florida case can be authoritatively determined by the Florida Supreme Court. Except for the deletion set forth above (n. 2 and accompanying text) the Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit, Rule 12) the Petition for Rehearing En Banc is denied.

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[4] The map insert in Coastal's brief on rehearing shows the magnitude of these leases:

| Lease | Acreage |
|---|---|
| 224-A | 1,936,100 |
| 224-B | 1,974,360 |
| 248 | 660,736 |
| | 4,571,196 |

These leases extend out into the Gulf of Mexico approximately 10.36 miles offshore along the West Coast of Florida from about Apalachicola to just south of Naples.

## APPENDIX C

COASTAL PETROLEUM COMPANY

v.

SECRETARY OF THE ARMY OF THE UNITED STATES, ET AL.

315 F.Supp. 845 (S.D. Fla., 1970)

### MEMORANDUM OPINION

ATKINS, District Judge:

* * * *

The question of the validity of the leases is the most significant aspect of the lawsuit. Coastal leases numbered 248, 224A and 224B cover large areas of this State and can be the locale for all types of activity by Coastal—activity which may not require government approval or be limited by such things as the definition of a mineral. In light of Collins v. Coastal Petroleum, 118 So.2d 796 (Fla.App.1960), Coastal's Exhibit 48, a letter written by an employee of the Trustees, James T. Williams, and the resolutions of the Trustees in ratifying the footage allocation and in approving an assignment and agreement between Coastal and Mobil Oil Co., I find that the leases between Coastal and the State of Florida as represented by the Trustees are valid.

The history of these leases up until 1960 is set forth in the *Collins* opinion and incorporated herein by reference. Originally granted for the purpose of promoting oil and gas exploration, the Trustees and Coastal expanded the scope of the leases to include minerals. It was this expansion which came under attack in *Collins*. The manner in which the leases had been originally entered into and the statutory basis for such leases has been long settled by the case of Watson v. Holland, 155 Fla. 342, 20 So.2d 388 (1945). That case, incidentally, found the Trustees on the other side as they contended that the leases were valid.

The holding in *Collins* and Judge Taylor's subsequent pronouncements in *Bryant, supra,* stating that the leases

are valid remove any doubt as to the continued viability of the leases up until 1964. The leases were renewed at five-year intervals and 1964 was such an interval. At that point there were two occurrences which operated to renew these leases for another five-year period. The first of these was a resolution of the Trustees on February 27, 1965 which approved a contract between Coastal and Mobil Oil Co. concerning the leases. The contract stated that the leases were not encumbered. The second occurrence was a letter written by a State employee, James T. Williams, to Mobil Oil Co. The letter confirmed the action taken by the Trustees as follows:

> "* * * the Trustees, at their meeting on February 17, 1965, approved the letter-agreement and joint-operating-agreement, both dated December 16, 1964, between Socony Mobil Oil Company, Inc., and Coastal Petroleum Company * * *"

Inherent in the finding that the leases are valid are the conclusions that the principles of res adjudicata should not be relaxed because of the public's interest in the subject matter of this suit and that the Trustees are estopped from declaring the leases void. The matter of res adjudicata is easily dealt with. The doctrine has been given its accepted dignity by my reliance on *Bryant* and *Collins*. If it can be said that the doctrine may be weakened in cases of the public's interest, it is nevertheless unnecessary in this case as the final remedy granted will reflect. With regard to the Trustees being estopped, this finding only applies to the period up until the last renewal, December of 1969.[7] Discussion of Coastal's reliance on the existence of the leases and the Trustees' renewals is unnecessary as it is obvious on the face of the record.

* * * *

[7] Action on this renewal has been held in abeyance pending resolution of this suit.